No. 11350

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,

Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK, Bankrupts, and IGNATIUS F. PARKER, Trustee of the Estates of Bankrupts,

Appellees.

BRIEF FOR APPELLANT.

JAMES P. CLARK,
519 O. T. Johnson Building, Los Angeles 13,
Attorney for Appellant.

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Appellees.

BRIEF FOR APPELLANT.

Statement of Pleadings and Jurisdiction.

On June 13th, 1944, Appellees, George O. Cook and Minnie M. Cook, filed their separate petitions in bankruptcy, which were approved and referred to Hugh L. Dickson, Esq., Referee in Bankruptcy. [Tr. pp. 2-22.]

Assets set out in schedules attached to each petition are the same, with the exception that Minnie M. Cook claims an automobile worth $70.00. George O. Cook discloses assets amounting to $3100.00, and Minnie M. Cook $3170. George O. Cook's schedule of debts total $3924.80 (total is erroneously stated as $3424.80) and Minnie M. Cook's debts are scheduled as $3424.80. All assets disclosed in each petition claimed as exempt. [Tr. p. 19.] Petition and Schedules A and B of Minnie M. Cook, contained in Clerk's Certified Record, pages 13-33, are not included in

printed record, by request of Appellant [Tr. pp. 108-9], as they are identical with those of George O. Cook, with the exception that schedule of assets sets out an automobile worth $70.00, and her schedule of debts does not include $500.00 owing to a Mrs. Miller (mother of Minnie M. Cook).

Ignatius M. Parker was appointed Trustee of the estates of said Bankrupts, and in Reports of Exemptions, filed in each estate on July 17, 1944, all assets in each estate were allowed and reported as exempt. [Tr. pp. 23-26.]

On August 7, 1944, and within time allowed, Appellant served and filed written objections and exceptions to the Trustee's Report of Exemption, in each proceeding, of real property claimed as a homestead. [Tr. pp. 27-30.] Objections and Exceptions to Trustee's Report in Minnie M. Cook's bankruptcy, set out in the Clerk's Certified Record on Appeal at pages 40-43, are not included in the printed Record on Appeal, by direction of Appellant, as they are identical with those in the George O. Cook matter. [Tr. p. 109.]

Hearings of Objections and Exceptions to Trustee's Report of Exemptions were held on September 28 and October 5, 1944, before the Referee. At the outset of the hearing on September 28th, it was stipulated in open Court that all matters in each bankruptcy could be heard and considered at the same time, and that all testimony offered and received be considered in both matters. [Tr. p. 81.] And thereafter in findings, orders, etc., both bankruptcies were considered and determined as consolidated.

On October 5, 1944, both matters were argued and submitted and thereafter and on December 31, 1945, the

Referee made and filed his Findings of Fact and Conclusion of Law, and on the same day his Order as such Referee, overruling Appellant's Objections and Exemptions and approving the Trustee's Report of Exemptions. [Tr. pp. 31-37.]

On February 1, 1946, and within time allowed, Appellant served and filed its Petition for Review of Referee's Order by Judge of United States District Court. [Tr. pp. 38-46.]

On April 5, 1946, after hearing on April 1st, the United States District Court made its order denying Appellant's Petition and approving and affirming Referee's Order. [Tr. pp. 65-66.]

On May 3, 1946, Appellant filed its appeal from such order to this Court, and the Clerk of the District Court made service. [Tr. p. 67.]

On May 9, 1946, Appellant served and filed Designation of Points on which it intended to rely on appeal [Tr. pp. 71-75], and on the same day served and filed Designation of Papers and Matters to be included in the Clerk's Certified Record on Appeal [Tr. pp. 76-77]; Certificate of United States District Court attached [Tr. pp. 78-79]; Reporter's Transcript of Evidence [Tr. pp. 80-107]; Transcript filed with the Clerk of this Court on June 11, 1946; Statement of Points on which Appellant intends to reply on this appeal and Designation of Portion of Certified Record to be printed for consideration thereof. [Tr. pp. 108-110.]

This appeal was taken under Section 24a of the Bankruptcy Laws as amended in 1938 and 1939; also within the time fixed by Section 25.

Statement of Case.

The Bankrupts were formerly husband and wife and while such acquired the east 40 feet of the south 135 feet of Lot 7 in Sunnyside Heights, as recorded in Book 8, page 88 of Maps, in the Office of the County Recorder of Los Angeles County, State of California. This property was improved with a residence and situate at 1513 West 105th Street, Los Angeles, California. Deed made to bankrupts as joint tenants and recorded June 24, 1939. A declaration of homestead, in the execution of which both Bankrupts joined, was recorded June 22, 1940. [Tr. p. 32.]

Shortly after this homestead was recorded these Bankrupts, as partners doing business under the name Koch Oil Company, filed on July 24, 1940, their Petition in Bankruptcy, and adjudication and reference was had. This petition was filed in the United States District Court at Los Angeles, California, as No. 36,744-C, and in the list of assets included the above described real property and claimed exemption thereof as a homestead. [Tr. pp. 92-95.] The adjudication was set aside and the proceedings dismissed in July, 1941. [Tr. p. 96.]

It is a fair and probable inference that the Bankrupts recorded the Declaration of Homestead on June 22, 1940, with the intent and purpose of going into bankruptcy (which they did do about a month later), sloughing off their debts, and then coming out with the homestead property. But they were then in the oil business, as set out in their petition, at 9659 South Alameda Street in Los Angeles [Tr. p. 93], so they backed off from the bankruptcy proceedings and the same were subsequently abandoned.

In the present proceedings, both Bankrupts in Section A, subdivision 7 of Statement of Affairs, in answering

the question, "What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein," answered "None." [Tr. p. 96.]

On or about September 17, 1941, Appellant, in a suit against George O. Cook and Minnie M. Cook, obtained a judgment against them in the Superior Court of Los Angeles County, California, in the sum of $3431.19 and costs. That partial satisfaction had been made on this judgment, and that at the date of the filing of the present proceedings there was due Appellant the sum of $2777.16 and claim for this amount was presented and allowed by Referee. [Tr. pp. 29-30, 34.]

On November 15, 1941, the husband, George O. Cook, left the homestead and deserted his wife, Minnie M. Cook, and his children [Tr. pp. 32, 47]; and on May 29, 1942, the wife filed suit for divorce on the ground of extreme cruelty against her then husband, George O. Cook, but in the complaint no real property is described and no mention is made of the homestead, and it is affirmatively alleged that there was no "community property." [Tr. pp. 47-49.] Service was had on the defendant in that case, but he did not appear or answer but made default and his default was entered. [Tr. pp. 50-51.]

On June 30, 1942, an Interlocutory Decree was entered in said action granting the divorce to the wife, the care and custody of the minor children and ordering defendant to pay to plaintiff for her support and that of two minor children $16.00 a week. No real property is mentioned in this Interlocutory Decree and no mention is made of the homestead. [Tr. pp. 53-54.]

The Bankrupt, Minnie M. Cook, after her husband left her on November 15, 1941, continued to reside at the

homestead with her daughter, Lila Lorine Cook, until sometime in March, 1943, when she left the homestead and moved to 5515½ South Broadway, in Los Angeles, and has not returned to the homestead at any time since. [Tr. pp. 33, 85.]

In March, 1943, the Bankrupt, George O. Cook, returned to the homestead when his former wife moved out and has since continued to live there. From March on to about a week prior to September 28, 1944, his minor daughter, Lila Lorine, lived thereat with him, when she moved over to 5515½ South Broadway with her mother, and has ever since lived with her mother. [Tr. pp. 33-34, 86-87.]

On July 1, 1943, the Final Decree in the divorce action was entered. This Final Decree also failed to mention any real property and did not mention or refer to the homestead. [Tr. p. 58.] Shortly after the entry of the Final Decree George O. Cook married Evelyn Detweiler and took her to live at the homestead. [Tr. pp. 89-90.]

On June 29, 1942, a written property agreement was made by the Cooks which gave the household furniture to the wife, provided for $16.00 a week to be paid to the wife for the support of herself and children and $100.00 attorney's fee to be paid by the husband in the divorce action, and it also contained a mutual waiver of inheritance and claims one against the other, but no mention is made of the real property owned by them and no mention or disposition of the homestead. [Tr. pp. 55-57.] This agreement was put in evidence in the divorce action as Plaintiff's Exhibit 1.

On June 13, 1944, the Cooks filed their separate petitions in bankruptcy, with schedules of assets and debts

practically the same, and each claiming this property, hereinabove described, as a homestead and exempt. The Trustee in Bankruptcy made his report exempting the claimed homestead and also all personal property. [Tr. pp. 23-26.]

Appellant filed written objections to the Trustee's Report, exempting the homestead, which were heard by the Referee on September 28 and October 5, 1944. It developed at the hearing that the minor daughter, Lila Lorine, had left the homestead about a week prior to September 28, 1944, and gone back to live with her mother [Tr. pp. 34, 87] and has lived with her ever since. [Tr. p. 34.]

Findings and Order made by Referee December 31, 1945, overruling Appellant's objections and exceptions and approving Trustee's Report of Exemptions. Petition for review of Referee's order by judge, served and filed and heard in the United States District Court at Los Angeles on April 1, 1946, and order entered April 5, 1946, denying petition and affirming order of Referee. On May 3, 1946, Appellant filed Notice of Appeal from said order to this Court.

Date of birth of Lila Lorine Cook, the minor, was October 8, 1925. [Tr. p. 103.] So this minor will be of age on October 8, 1946—very close at hand. But is it any longer of any importance, as the testimony and the findings indicate, that she left the homestead in September, 1944, and has lived away from there ever since? The divorce between the Cooks under the conditions disclosed by the pleading and decrees in that case show an abandonment in law, and the real property held in joint tenancy was remitted to the former owners, that is, each one-half of the property as his or her separate property, and the

homestead ceased to exist on entry of the divorce decree and long prior to the commencement of these bankruptcy proceedings. The decree of divorce restored to each of the Cooks their former status of single persons, and their several and separate ownership of one-half of the real property, formerly covered by the homestead, but freed of the homestead, as it was terminated by the divorce.

Assignment of Errors.

(1) The District Court erred in denying Appellant's Petition for Review of Referee's Order, overruling the objections and exception of Appellant to the Report of the Trustee in Bankruptcy, exempting as a homestead certain real property described therein.

(2) That the District Court erred in affirming the order of the Referee in Bankruptcy approving the Report of the Trustee in Bankruptcy, exempting to Bankrupts the real property described in such report, as a homestead.

(3) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce between the Bankrupts.

(4) That the District Court erred in affirming the order of the Referee in Bankruptcy, overruling the objections and exceptions of Appellant to the Report of the Trustee in Bankruptcy, exempting the real property therein described as a homestead of Bankrupts, in that said order of the Referee is not supported by his own Findings of Fact, but is contrary thereto.

(5) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupts, declared on jointly held

property, did not become abandoned by reason of the divorce between the Bankrupts, in that such order of the Referee is contrary to the evidence showing an abandonment of the homestead in the divorce proceedings between the Bankrupts.

(6) That the District Court erred in denying Appellant's Petition for Review of Referee's order set out in said Petition, in that the same is contrary to law.

(7) That the District Court erred in affirming the order of the Referee in Bankruptcy overruling Appellant's objection and exceptions to the Report of Trustee in Bankruptcy, exempting to Bankrupts the real property therein described, as a homestead, in that the same is contrary to law.

(8) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce action between the Bankrupts, in that the order of the Referee is contrary to and not supported by the evidence produced at the hearing, nor by the Findings of Fact made by the Referee on which such order is based.

(9) That the District Court erred in affirming the order of the Referee in Bankruptcy, presented in Appellant's Petition for Review, in that it affirmatively appears by the Findings of Fact of the Referee, on which such order is based, that at the time of the hearing of Appellant's objections and exceptions to the Report of the Trustee in Bankruptcy, and the evidence then produced, that there was then living on the former homestead only the Bankrupt, George O. Cook, and his second wife, and that no new homestead had been declared or recorded, on the real property involved herein, by the said George O.

Cook or his second wife, subsequent to the Final Decree of divorce between Bankrupts.

(10) That the District Court erred in affirming the order of the Referee in Bankruptcy, set forth in Appellant's Petition for Review, in that said order was not supported but was contrary to the Referee's Findings of Fact and the evidence in the reporter's transcript of evidence before the Court.

(11) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupt, Minnie M. Cook, had not become abandoned by reason of the divorce between Bankrupts, in that the said Minnie M. Cook, as shown by the evidence and Findings of Fact, had not lived on the homestead property since March, 1943, and at the time of the filing of her petition in bankruptcy was a single person and not the head of a family and resided away from the homestead, and then held a half interest in the real property covered by the homestead as her separate property, subject to the payment of debts.

(12) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupt, George O. Cook, had not become abandoned by reason of the divorce between the Bankrupts, in that he was adjudged in the divorce proceedings to be the guilty party, was not the head of a family and was a single person after entry of the divorce decree, and owning only a half interest as his separate property in the real property covered by the former homestead, which had become abandoned by the divorce between Bankrupts, and that he did not at any time subsequent to his remarriage thereafter declare or record a new homestead on the property involved.

ARGUMENT.

I.

In an Action for Divorce, Where Defendant Suffers His Default to Be Entered, and Neither the Homestead or the Property on Which It Is Declared, Is Mentioned in the Complaint or the Decree of Divorce, and the Court Makes No Disposition in the Action, of the Homestead, the Homestead Is Deemed Abandoned and the Parties Remitted to Their Former Status of Ownership of the Property.

In the case of *Burkett v. Burkett,* 78 Cal. 310, which was an action to quiet title by plaintiff against his former wife, it appears that the husband sometime prior to the divorce declared a homestead on his separate property, and then conveyed the property to his wife; in the divorce action nothing was said about the homestead and no action taken as to it; held that the wife by reason of the deed became the "former owner," and that upon the divorce being granted her title to the property became absolute. At page 317 the Court said:

> "It affirmatively appears from the record before us that the *plaintiff was not the innocent party in the divorce suit,* but if he had been his only right was to ask to have the property set apart to him in that proceeding. Not having done so, her title to the property became absolute as between them, from the granting of the divorce." (Italics ours.)

In the case of *Shoemake v. Chalfant,* 47 Cal. 432, the homestead was divided between husband and wife by decree of divorce, each to hold his or her allotted part free and clear of the claims of the other. Prior to the divorce

one Chalfant had a judgment against the husband and after the divorce levied on the husband's part of what was formerly the homestead; the Court, at page 435, said:

> "The question presented is, whether the premises in controversy remained the homestead of the plaintiff after they were allotted to him by the decree of divorce. The decree severed the sort of joint-tenancy of the parties in the homestead premises, which had been created by the homestead declaration, the residence of the parties, etc., under the provisions of the Homestead Act. *It also destroyed the right of survivorship.* The joint deed of both parties is no longer essential for alienation or abandonment of any portion of the premises. The family for whose benefit the provisions of the Homestead Act were mainly designed, was severed by the decree, and neither the husband nor the wife is entitled to reside on that portion of the homestead premises which was allotted to the other. All the principal qualities of the homestead estate, except that of exemption from liability for debts, etc., *having been destroyed by the decree, the latter in our opinion, was also destroyed. The decree was as effectual in its results as would have been a declaration of abandonment."* (Italics ours.)

In the case of *Huellmantel v. Huellmantel,* 124 Cal. 583, which involved a homestead, and wherein the Court awarded to the wife alimony and made no disposition of the homestead, the Court at page 588 said:

> *"The effect of the decree is to leave the title to the property in defendant Huellmantel freed* (italics ours) *from the homestead,* although the Court did not directly and explicitly assign it to the former owner, as section 146 directs the Court to do, if not assigned for

a limited period to the innocent party (Burkett v. Burkett, 78 Cal. 310)." (Cited in *Cooper v. Miller,* 165 Cal. 31, 34.)

The case of *Zanone v. Sprague,* 16 Cal. App. 333, is directly in point. There the homestead was declared for the benefit of husband and wife, on the separate property of the husband by the husband. Afterwards a divorce was granted on complaint of husband; the homestead was not disposed of by the decree of divorce; the husband died and the former wife claimed ownership of the property by reason of the declaration of the homestead, made during coverture, "and said homestead never having been abandoned during the lifetime of Coad (her former husband) by the mode prescribed by law." At page 336 of the opinion the Court said:

> "The decree of divorce is absolutely silent as to the homestead or other property, and, manifestly, in such case, if either or both of the propositions contended for by the defendant are maintainable, Catharine Powers had no interest of whatsoever kind or nature in the property in dispute at the time of the commencement of this action."
>
> "We are of opinion that the second proposition urged by the defendant, viz., that whatever interest in or rights under the purported homestead acquired by plaintiff's intestate *were lost upon the entry of the decree granting Coad a divorce from her, is sound and must be sustained."* (Italics ours.)

Again quoting from page 337:

> " 'The policy of homestead laws,' says Waples in his work on 'Homestead and Exemptions,' page 29, 'is the conservation of homes for *the good of the state; the mischief to be prevented by this law is the*

breaking up of families and homes to the general injury of society and the state; the remedy provided is the exemption of occupied family homes from the hammer of the executioner,' and therefore, 'as to homestead statutes, liberal construction is the rule so far as concerns exemptions.' *(Id.) In other words, homestead statutes are not designed to screen debtors or to protect them against the performance of their just obligations, but to provide for the conservation of homes in the interest of the general welfare and to that end to protect homes against the business misfortunes or the improvidence of heads of families."* (Italics ours.)

And again from page 338:

"If, as we conceive to be the correct rule, the only interest of plaintiff's intestate could have in said homestead, after the divorce was granted, is limited to that interest which she might have acquired had the court found (and made an order accordingly) that the exigencies of the action for divorce warranted it in assigning said homestead to her for a 'limited period,' then, the court not having so found or made such assignment of the homestead, it seems to us that it of necessity follows that whatever rights she might have claimed under said homestead terminated, ipso facto, with the entry of the decree of divorce. Nor since the homestead was selected from his separate property, was it necessary, in order to vest in Coad the whole of the homestead interest, that the court should have expressly and by its decree or otherwise assigned to him said homestead. The 'family' for whose benefit the homestead was selected from the separate property of the husband having been destroyed by the decree of the court divorcing the parties, the homestead necessarily ceased to exist

> *as to that family, and the homestead, not having been assigned to the wife at the time of the making and entry of the divorce decree, the property so impressed, remained in its former owner, freed from and unencumbered by any claim which the former wife might have had to it by reason of said homestead* (Waples on Homestead and Exemptions, p. 67 *et seq.;* Brady v. Kreuger, 8 S. D. 464 (59 Am. St. Rep. 771, 66 N. W. 1083; Hahn v. Starcks, 89 Tex. 203, 34 S. W. 103)." (Italics ours.)

So under the case at bar, where there was no mention of the homestead in the pleadings or the decree of divorce, the family relation was dissolved, and no assignment of the homestead for a limited or any period having been made, the homestead was also terminated and the husband and wife remitted to whatever ownership they had in the property, prior to its being impressed with the homestead; that is, separate owners, each of one-half, and as such subject to his or her debts. As each owned at the date of petition in bankruptcy one-half of the property, as his or her separate property.

We quote further from the case of *Zanone v. Sprague, supra,* page 340, wherein *Brady v. Kreuger,* 8 S. D. 464, is cited and quoted as authority and approved as follows:

> "The decree of divorce made no disposition of the homestead—in fact it was absolutely silent upon that subject—but it was, nevertheless, contended by the appellants in that case that after a divorce the wife retains her interest in the homestead, and that under the facts proven in this case, she was entitled to retain possession of the premises occupied by herself and husband at the time the divorce was granted."

The Supreme Court of South Dakota disposes of this proposition adversely to the contentions of the appellants as follows:

> "Appellants contend that this court will presume, in the absence of testimony to the contrary, that the decree gave her the right to take possession of the homestead. But this we cannot do. Courts will sometimes indulge presumptions to support a judgment of a court but never to reverse it. In the absence, therefore, of any proof as to the contents of the decree of divorce, we cannot presume that it contained anything favorable to the defendants. *The relation of the husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court.* If the decree of the court preserved her rights to the homestead, or conferred upon her any other privileges in, or interest in or to, the property of the husband, the burden was upon her to establish such rights by the decree, as she clearly would have no right to the possession of the homestead after a decree of divorce had been granted, unless saved by the decree. There being in this state no right of dower, or other absolute claim of the wife upon the property of the husband, except under the law of succession, as his widow, and which depends solely upon the fact that she is such wife or widow, *she can only avail herself of these claims by showing that she occupies either one or the other of these relations named, to the husband. As the wife, upon a dissolution of the marriage, ceases to be the wife, and can never be the widow, of her divorced husband, her claims upon his property, necessarily, also cease and terminate upon the divorce."* (Italics ours.)

The Appellant contends that is exactly the situation in the case at bar. Inasmuch as the decree of divorce made no disposition of the homestead nor of the property covered by the homestead, the wife, Minnie M. Cook, has no claim to the half interest of her husband or to or under any homestead that was formerly on his property. And the same is true as to the husband, George O. Cook; he has no interest or right in the property of the wife or any homestead which formerly covered her half interest. The homestead terminated as to both bankrupts by the decree of divorce rendered, and they each were remitted to their former status of ownership. If the property in question had been community property, they would have become tenants in common. Therefore, when they came into a court of bankruptcy and submitted their assets to adjudication therein, this Court can now consider only their status of ownership in the real property at the date they filed petitions of bankruptcy, and that was the ownership of an one-half interest in the property, which they each then held as his or her separate property.

> "The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons."
>
> Civil Code of California, Sec. 91.

We now call the Court's attention to the leading case in California on this subject, the case of *Lang v. Lang,* 182 Cal. 765. That action was one for partition of property, formerly belonging to husband and wife, as community property and on which there was a homestead at the time of the divorce. The husband brought the divorce action; his complaint contained no reference to the homestead or any property, community or otherwise; the wife was served with summons and complaint, but failed to appear

and her default was entered and an Interlocutory Decree entered granting divorce to the husband, but made no mention of the homestead or any property. The Final Decree, however, set apart to the husband the homestead. Thereafter the wife brought action for partition of the property covered by the homestead. It was held that as the complaint in the divorce action tendered no issue as to the community homestead, and the Court made no finding as to the homestead or other property, the trial court was without jurisdiction in the final decree to make any order as to the property rights of the parties, such question not being before it; and the judgment of the trial court granting partition was affirmed. Upon the question of the effect of a divorce, granted by default, where neither the complaint or the findings, present issues as to homestead or property, the Court, at page 770, said:

> "However this may be, the law has made provision for the disposal of the homestead upon the dissolution of a marriage under which the rights of the parties may be equitably adjusted (Civ. Code, sec. 146, subd. 3). For reasons not disclosed by the record defendant failed to avail himself of this provision, for he raised no such issue in his divorce action. While as a general proposition a homestead cannot be made the subject of an action for partition, the principle has no force when applied to instant case. Here the family was severed by the decree of divorce and the qualities of the homestead estate were thereby destroyed (Rosholt v. Mehus, 3 N. D. 513, 23 L. R. A. 239, 57 N. W. 783; Bahn v. Starck, 89 Tex. 203, 59 Am. St. Rep. 40, 34 S. W. 103). Such a decree is as effectual in producing this result as would be a declaration of abandonment, for where, as here, the homestead, having been carved out of the community

property, and no proper disposition having been made of it by the decree, the parties became tenants in common thereof, and this being so each had the right to sever their joint ownership. (De Godey v. De Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35 (35 Am. St. Rep. 141, 32 Pac. 803); Kirchner v. Dietrich, 110 Cal. 505 (42 Pac. 1064); Tabler v. Pevrill, 4 Cal. App. 671 (88 Pac. 994); Brown v. Brown, 170 Cal. 1 (147 Pac. 1168); and Shoemake v. Chalfant, 47 Cal. 432.) Under the circumstances of this case defendant upon the granting of the divorce ceased to be the head of a family, and he was no longer entitled to a homestead exemption of the character here involved. (Zanone v. Sprague, 16 Cal. App. 333 (116 Pac. 989).) No family, no homestead. (Waples on Homestead Exemptions, p. 70.) The homestead being destroyed, the parties as tenants in common could convey or sever their relative interests therein. (Simpson v. Simpson, 80 Cal. 237 (22 Pac. 167); Grupe v. Byers, 73 Cal. 271 (14 Pac. 863); and Brown v. Brown, *supra;* 13 Ruling Case Law, p. 679.)"

This case has never been overruled, but was approved in a recent case determining homestead rights as between husband and wife, *Walton v. Walton,* 59 Cal. App. 26, 29, where it was said:

"And that once the wife impresses premises with a valid homestead, the husband is without power to destroy it except in the manner provided by statute (Mills v. Stump, 20 Cal. App. 84 (128 P. 349), that is by an instrument executed and acknowledged by the husband and wife (secs. 1242 and 1243, Civ. Code), *or by a decree of divorce* (Lang v. Lang, 182 Cal. 765, 190 Pac. 181)."

At page 34 of the *Walton* case the Court said:

> "In the case of Lang v. Lang, *supra*, the homestead was declared on community property, and the court fully recognized the general rule above mentioned that a homestead is not subject to an action for partition, but it was held under the facts of that case the rule did not there apply for the reason that the family was severed by a *decree of divorce and the qualities of the homestead estate were thereby destroyed*." (Italics ours.)

In the case of *Lang v. Lang, supra*, the rights of minor children were not involved; the only issue of the marriage was a son, who at the time of decree of divorce was of age; the Court said at page 770 of the decision, "Here, however, the rights of minor children are not involved." Nor did the Court say that if there had been minor children its decision would have been different from that given, that question not being involved; what was said as to minors was mere *dicta*. At page 769 is to be found this statement:

> "Authority can be found to the effect that where the rights of children are concerned, the homestead is not affected by the divorce, where the decree is silent upon the question."

Then citing three out of state cases. These I have examined carefully, and find that only one case seemingly supports the rule referred to; the second case is directly against it and in harmony with the *Lang* case and in the third, the rights of minor children are not involved.

The first case cited, *Redfern v. Redfern*, 38 Ill. 509, was an action of ejectment brought by the former wife, after husband had obtained a divorce on the ground of

adultery. The action was based upon two deeds, the first from husband and wife (the Redferns) to one Houts and a deed made later by Houts to Mrs. Redfern. In previous years, and before the deed to Houts, the property had been made a homestead by the Redferns. The husband returned from the army in 1862; the wife refused to live with her husband; he broke into the house with an axe and took possession; the wife left and the suit for divorce followed. Nothing is set out as to the terms of the decree. Redfern continued to live at the place with two minor children. The Court held that the homestead had not been abandoned by the deed of husband and wife to Houts. Ejectment denied and former husband continued to live on property under the homestead. Decree in 1865. Under the statutes and decisions in California a deed by husband and wife to a third party is an abandonment of the homestead and the basis for the *Redfern* decree is not clear. It is not good law in California.

The case of *Holcomb v. Holcomb,* 18 N. D. 561 (120 N. W. 547), is one where the wife got the divorce, was awarded the custody *of the minor child and a sum of money annually for the boy's care and education.* (Italics ours.) The father died shortly after the divorce and on petition of the mother the homestead property was set apart for the minor child by the probate court. On appeal to the District Court the decree was reversed and on further appeal to the Supreme Court the reversal by the District Court was upheld, the Court holding with the *Zanone v. Sprague* and *Lange v. Lange* cases *that the divorce destroyed the homestead, as the decree of divorce made no disposition of it, and that at the date of Holcomb's death he was a single man, as the previous divorce had changed his status.* (Italics ours.)

In the third case cited, *Byers v. Byers,* 21 Iowa 268, the wife in 1864 got a divorce from her husband, to whom she had been married in 1824. Eight years before divorce homestead was established on 40 acres. No mention of homestead in decree. Wife was awarded alimony in sum of $2000. Execution was had on other property of husband and $1500 realized. Sale of homestead property sought by wife on second execution, but was enjoined at suit of former husband on the ground it was his homestead. *Rights of minor children not involved; no evidence of any children.*

2 Bishop on Marriage, Divorce and Separation, Section 1210, is also cited in the *Lang v. Lang* case, *supra.* But this section relates to the responsibility of the father to support and maintain his children and does not deal with the subject of homestead rights or status as affected by divorce or otherwise.

In the case at bar an order was made as to the custody of the children, awarding them to the mother, and also for their maintenance by the father; and this to continue during the minority of the minor daughter. If, as the testimoney indicates, the father did maintain or contribute to the maintenance of the minor daughter in a limited way and for a limited time, *this was nothing more than was imposed upon him by order of Court, and could not improve his position as to the homestead.*

The three out of state cases cited in the *Lang* case, following the statement, "Authority can be found to the effect that where the rights of children are concerned the homestead is not affected by divorce where the decree is silent on the question," are not apt and not authority for

the above statement. The *Redfern* case did involve minors, but an abandonment of the homestead, such as is provided by Section 1243 of our Civil Code, was shown, inasmuch as the husband and wife, prior to the divorce, made a deed of the property covered by the homestead to a third party, and moreover the terms of the divorce decree are not shown, and it cannot be determined whether the divorce decree was silent as to the homestead or not.

The *Holcomb* case involved a minor, but is not authority for the above citation in the *Lang* case; in fact it is directly contrary to that contention, and is in fact in full accord with the doctrine set out in the *Lang* case, that a divorce without disposition of the homestead, notwithstanding there is a minor child of the parties, puts an end to the family relation and homestead; the defendant husband became a single person, his separate property was freed of the homestead, and that his minor son could not, after the death of his father, have the homestead property set aside to him as a probate homestead.

The third case cited, the *Byers* case, did not involve children at all, either minor or major; the decree gave the wife $2000 alimony, and after realizing $1500 on execution sales of the husband's property, she levied on the place on which a homestead had been declared prior to the divorce and on which the husband lived. The divorce decree made no disposition of the homestead; the wife's writ of sale was enjoined on the ground that this was the husband's homestead. This property was the separate property of the husband, and became his absolutely free from the homestead, under the California decisions, after the divorce. It is not authority for the citation; it is not even in point, as there were not any minor children involved.

II.

Children Have No Rights in Homestead of Parents While Parents Are Alive.

> "Whether children have any rights in premises occupied as a homestead at the time of a divorce, depends largely upon the terms of the statute in the particular jurisdiction. *They have no rights therein except such as the statute gives them.*" (Italics ours.)
>
> *Wiggins v. Russell,* 58 N. H. 329;
> *Heaton v. Sawyer,* 60 Vt. 495 (15 Atl. 165).

> "At the same time it is provided by statute that the title to a homestead shall be vested by decree of court, granting a divorce, in the wife, and after her death it shall pass to the children."
>
> *Jackson v. Shelton,* 89 Tenn. 82 (16 S. E. 142).

But the right under such a statute is lost when the wife does not seek and obtain it.

Carey v. Carey, 163 Tenn. 486 (42 S. W. (2d) 498).

The only rights of minors under a homestead in California is found in the Probate Code, and after the death of the father or mother. After a divorce which expressly or by omission in the decree to deal with the homestead, it is lost; even the probate provisions of the law do not apply, as there is no survivor to take, and if a homestead can be set off to a minor, it must be by decree of the Probate Court. Of course, if the husband or wife dies, without the destroying intervention of a divorce decree, the survivor or heirs take, and it may be set aside to minors during minority.

There is no statute in California giving a minor child a vested or present interest in a homestead declared by its parents. This has been expressly held by the Supreme

Court of California in the case of *Gerlach v. Copeland,* 212 Cal. 758, in which at page 760 it was said:

> "It is obvious that the declaration of homestead neither created nor vested any present title or interest in the minor son at the time the declaration was made and that any interest to which he might become entitled would be by virtue of the provisions of section 1265 of the Civil Code, *i. e.,* by succession as an heir."

The mother who filed the declaration of homestead in the above case claimed rights on behalf of a minor son by reason of the homestead.

III.

Joint Tenancy Between Husband and Wife Creates a Condition in Which the Interest of Each Spouse Is the Ownership of Separate Property.

Joint tenancy in property between husband and wife creates a condition in which the interest of each spouse is separate property.

Siberell v. Siberell, 214 Cal. 767, 770;
In re Kessler, 217 Cal. 32, 34.

> "This court has recently determined that in the absence of any evidence of an intent to the contrary, when property is purchased with community funds and the title is taken in the name of the husband and wife as joint tenants, the community interest must be deem severed by consent, and the interest of each spouse therein is separate property (Siberell v. Siberell, 214 Cal. 767 (7 Pac. (2nd) 1003)."

Delanoy v. Delanoy, 216 Cal. 23, 26.

In the divorce action between the Bankrupts the complaint alleges, "That there is no community property." [Tr. p. 48.] Neither the Interlocutory nor the Final

Decree of divorce mentioned any property, community or otherwise, and this was an adjudication that there was no community property.

A like situation existed in the case of *Brown v. Brown,* 170 Cal. 1, and at page 6 the Court said:

> "Although the final decree is silent as to property, it nevertheless operates as an adjudication that at the time the action was begun there was not community property."

The above is approved in *Metropolitan Life Ins. Co. v. Welch,* 202 Cal. 312, in which at page 317 it was said:

> "Therefore, whatever other property either of said parties then owned or was interested in, in so far as its community character was concerned, was by said decree determined to be the separate property of the particular spouse in whose name it was then held."

Divorce destroys even the right of survivorship to the homestead property.

> *Shoemake v. Chalfont,* 47 Cal. 432, 435;
> *Zanone v. Sprague,* 16 Cal. App. 333, 336-338;
> *Brady v. Kreuger,* 8 S. D. 464.

The homestead declaration did not change this status and the decree of divorce, where no mention of the homestead was made, remitted each of the parties their former status of separate ownership, and neither could have or enjoy a homestead on the separate property of the other.

In the case of *Weinreich v. Hensley,* 121 Cal. 647, the wife had filed a homestead on separate property of the husband, the husband died and the homestead ended. It was held that the interest of the widow as heir or devisee in a homestead which has ceased to exist upon the separate property of deceased husband, is subject to attachment by her creditors.

IV.

A Husband's Rights in a Homestead on the Separate Property of Wife and Those of the Wife on the Separate Property of the Husband, Are Terminated by a Decree of Divorce Which Is Silent With Respect Thereto.

Burkett v. Burkett, 78 Cal. 310;

Skinner v. Walker, 98 Ky. 729 (34 S. W. 233);

Mize v. Boston, 185 Ky. 272 (215 S. W. 33);

Kern v. Field, 68 Minn. 317 (71 N. W. 515);

Gummison v. Johnson, 149 Minn. 329 (183 N. W. 515);

Klamp v. Klamp, 58 Neb. 748 (79 N. W. 735);

Arp v. Jacobs, 3 Wyo. 489 (27 Pac. 800).

In the case of *Gummison v. Johnson, supra,* it was held: That a divorce even though obtained in a foreign state, cuts off a husband's homestead rights in his wife's property.

In the case of *Klamp v. Klamp, supra,* it was held:

That a husband's inchoate right to select a homestead from his wife's separate property, with her consent, lapses on the entry of a decree of divorce.

In the case of *Arp v. Jacobs, supra,* the Court, in holding that a divorced husband lost all rights in the homestead of his former wife, said:

> "But where he (the husband) permitted his family to separate and the homestead is not in his own name and has lost the homestead character, where it has been adjudged his fault, the conditions have changed. He has no longer a homestead for his family, has ceased to be the head of a family, and at the passing

> of the decree of divorce he loses completely all rights he had in the premises, even that of a possible survivor of his former wife."

In the case of *Holcomb v. Holcomb,* 18 N. D. 561 (120 N. W. 547), it was held that a divorced husband, who by the decree of divorce has been deprived of the custody of his minor son, awarded to the mother, and who by the terms of the divorce decree was required to pay the mother a set sum for the support and education of the minor, which allowance was by the divorce decree made a lien on his separate property, formerly used as a homestead, that the husband after the divorce became a single person and that the homestead ceased to exist.

And in *Zanone v. Sprague,* 16 Cal. App. 33, it was held:

That a wife's right of homestead in the separate property of her husband is terminated by a decree of divorce which makes no reference thereto.

In *Brady v. Kreuger,* 8 S. D. 464 (66 N. W. 1083), the Court said:

> "The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court."

In *Skinner v. Walker, supra,* in commenting on the situation, after a divorce, the Court said:

> "The joint occupancy and enjoyment of the homestead, by the man and woman, became utterly impracticable after the severing of the marital relations and that certainly was not contemplated by the legislature. Consequently setting apart his land for her

use as a homestead, after such divorce, results in wholly depriving him as long as she chooses to occupy it; and to do that the court has no more authority than, after they are divorced, take her land occupied at the time and give it to him as his homestead. . . . In our opinion the divorce from the bonds of matrimony, effectually extinguishes the right of either husband or wife to the homestead owned by the other, as it by operation of Sec. 2144 bars the claim of either to the real or personal property of the other."

In the case of *Stamm v. Stamm,* 11 Mo. App. 598, it was said:

"The claim of homestead made . . . by a divorced wife, does not give her any right as against the husband in his real estate, occupied as a homestead by her and the infant child of both, at the time or since the divorce."

In the divorce action of *Quagelli v. Quagelli,* 99 Cal. App. 172, the plaintiff (wife) appealed from the judgment granting divorce on the ground of desertion and dividing community property, including a homestead, equally between her and her husband, on the grounds that the finding against her on the grounds of extreme cruelty and habitual intoxication were not supported by the evidence and that she as the innocent party should have had a greater portion of the property than one-half. The Court of Appeal reversed on the ground that the finding on the question of cruelty was against uncontradicted and corroborated testimony and that the division of property was not authorized by law, in that the statute provided that in case of divorce on ground of extreme cruelty or adultery, the innocent party is entitled to more than one-half of

community property. In its opinion reversing the judgment the Court, at page 177, said:

> "Under the provisions of subdivision 3 of section 146 of the Civil Code, the court is authorized to assign the homestead to the innocent party either absolutely or for a limited period, or it may be divided, or be sold and the proceeds divided. The section does not authorize the court to assign an undivided one-half interest in the homestead to the party at fault, as has been done here. In determining the proper division of the community property the trial court will also determine the course to be pursued as to the homestead property—by either assigning it to the appellant absolutely, or for a limited period, or by dividing it between the parties, or by ordering it sold and the proceeds thereof divided—in either awarding the appellant such proportion thereof as she may be entitled to receive under the views hereinbefore expressed."

In the instant case the divorce between the Bankrupts was granted on the ground of extreme cruelty, custody of the minor child awarded to the mother, and the defendant in divorce action ordered to pay to the mother a fixed sum for her support and that of the minor child. Nevertheless, in the absence of any provision in the divorce decree as to the homestead, the guilty party moves in and claims the homestead and still claims it, as against his creditors in bankruptcy. And his former wife, Minnie M. Cook, also claimed it as her homestead and exempt from the claim of her creditors, although she moved away from the homestead in March, 1943, and has not since returned thereto. And the minor daughter, Lila Lorine, who will be of age on October 8, 1946, left the homestead

shortly prior to September 28, 1944, and went to live with her mother at another address, where she has lived since that time, as found by the Referee in his Finding IV. [Tr. p. 34.] That leaves the Appellee, George O. Cook, living on the homestead with his second wife. She could not have or enjoy a homestead declared by the first wife and partly on the separate property of the first wife, nor would such homestead inure to her or her present spouse. The homestead was recorded in 1940 and this second marriage took place after the final decree of divorce was entered August 1, 1943.

In the case of *Santa Cruz Bank v. Cooper,* 56 Cal. 339 the defendant Cooper, while a widower, residing on certain real property, with two minor children, declared and recorded a homestead as head of a family thereon; several years later Cooper remarried; and about six years after this marriage Cooper executed a conveyance to the property, in which his wife (the second wife) did not join. In an action of ejectment the defendants as a defense contended that Frank Cooper acquired the homestead in question by virtue of being the head of a family, and that the right thus acquired inured upon his subsequent marriage to the benefit of his wife, and that thereafter the property could not be disposed of without the joint act of both husband and wife. It was found that the two minor children came of age before the second marriage and before the execution of the conveyance, and that the homestead ceased to exist thereafter. As to the second wife the Court, at page 341 of the opinion, said:

> "The homestead right which attached to the premises by virtue of the declaration filed by Frank Cooper on the 24th of May, 1867, having ceased to exist long prior to his marriage with the intervenor, and

> there having been no declaration of homestead filed by either after their marriage, it results that the joining of the wife in the conveyance to the plaintiff was not necessary, the property being the separate property of the husband."

This decision is pertinent on several points. 1. That a second marriage does not bolster up or sustain a prior claimed homestead. 2. That if declared by a single man, as the head of a family, and claiming it expressly on the ground of minor children living with declarant, it ceases when they become of age. 3. That the homestead thus declared does not inure to the benefit of a wife subsequently married.

V.

Divorced Man, Where Custody of Minor Children Awarded Wife, Not Head of Family.

It has been held that under a statute defining "head of a family" to mean the husband or wife, when claimant is a married person or any person who has been residing on the premises, his child, etc., a divorced husband, who by the decree has been deprived of the custody of his minor child and is required to pay the mother a stated sum for its support, which allowance is made a lien on the former homestead, is not "the head of a family."

Holcomb v. Holcomb, 18 N. D. 561.

One whose wife has secured a divorce because of his delinquencies cannot thereafter select a homestead in her land.

Klamp v. Klamp, 58 Neb. 748 (79 N. W. 735).

Interlocutory Decree.

"It has been determined in a divorce action under the provisions of our code the function of an interlocutory decree includes not only the establishment of the right of a party to a divorce but includes also the hearing and final determination of the rights of the parties as to property. Any disposition of the property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. If no appeal be taken, such decree becomes final with respect to those property rights, as well as to the adjudged right to a divorce (Huneke v. Huneke, 12 Cal. App. 199, 203 (107 Pac. 131); Pereira v. Pereira, 156 Cal. 1 (134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880), 103 Pac. 188. Necessarily the same consequences follow where the court takes into consideration and includes in its interlocutory decree the matter of the provision for the support of the wife."

Newell v. Superior Court, 27 Cal. App. 343, 344-5.

And where interlocutory decree makes no disposition of the homestead, the Court is without jurisdiction to make such disposition in the final decree.

Lang v. Lang, 182 Cal. 765, 767-9.

Where wife separated from husband by agreement and property divided, she having with her a minor child, can-

not after his death claim and have homestead set apart to her.

Wickersham v. Comerford, 96 Cal. 433.

A joint tenant may alienate or convey to a stranger his part or interest in the joint property.

Kissam v. McElligott, 280 Fed. 212.

VI.

Burden of Proof on Bankrupt Claiming Exemption on Objections to Trustee's Report Allowing Exemptions.

Matter of Rainwater, 191 Fed. 738;

McGahan v. Anderson, 113 Fed. 115;

In re Turnbull, 106 Fed. 667.

VII.

In Determining the Right to Exemption Under State Statutes These, as Interpreted by the Highest Judicial Tribunals of the State, Are Controlling.

Eaton v. Boston Safe Dep. & Tr. Co., 240 U. S. 427.

VIII.

After Divorce Where Decree Makes No Disposition of Homestead Property (Community) Parties Become Tenants in Common.

Tarien v. Katz, 216 Cal. 554, 559;

Taylor v. Taylor, 192 Cal. 71, 75;

Stewart v. Sherman, 22 Cal. App. (2d) 198, 203;

Estate of Brix, 181 Cal. 667, 676.

IX.

When Homestead Declared the Husband, George O. Cook, Was a Married Man and Homestead Declared Under Sections 1238 and 1239 on Joint Tenancy Property and His Rights Were Not Taken as the Head of a Family.

Sections 1238 and 1239 control when declaration on jointly held property and the homestead was so declared. There is another provision in 1238 for "unmarried man." If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Now if the homestead in the divorce proceedings, by being divided, or awarded to one or the other of the parties or vacated as may be done by the Court or by failure of the Court in the proceedings to take any action thereon, where it is not presented in the pleadings (as in the case at bar), then how could one of the Bankrupts revive or continue the homestead by having a minor child live with him? As he is not a married man, after the divorce, it is true he may be the head of a family, by reason of having any of the persons mentioned in Section 1261 live with him, and this would enable him to then file a declaration of homestead on any property owned by him, but this would be a new declaration and under different circumstances. He could not by merely living on property in which he had a half interest claim and hold under the old homestead, which had been vacated by the divorce—that would be to say that he could have a homestead on the separate property of his former wife. As it cannot be a homestead for George O. Cook,

neither could it be for Minnie M. Cook. That homestead was non-existent when the bankruptcy petitions were filed.

Appellant submits that the order and judgment of the District Court should be reversed and said Court directed to enter its order and judgment granting Appellant's petition and overruling and setting aside the order of the Referee in Bankruptcy overruling Appellant's objections and exceptions to Trustee's Report of Exemption of homestead property to Bankrupts and approving said report; and ordering and adjudging that the real property covered by such former homestead be declared an unexempt asset of Bankrupts, subject to be sold as such to pay allowed claims of their creditors; for costs of this appeal, and costs in the District Court and before the Referee, and for such other and further directions as this Court may deem proper.

Respectfully submitted,

James P. Clark,

Attorney for Appellant.